IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

NEWWAVE TELECOM AND TECHNOLOGIES, INC., Plaintiff/Counterclaim-Defendant,	)	
v.	)	
ZE JIANG, et al.	)	C.A. No. N20C-09-215 MMJ CCLD **UNDER SEAL**
Defendants/Counterclaim-Plaintiffs.	)	

Submitted: March 2, 2023
Decided: March 15, 2023

On Defendants/Counterclaim-Plaintiffs'
Motion for Summary Judgment on Counts I–III
and Counts I, II, IV and VI of Defendants' Counterclaim
GRANTED IN PART, DENIED IN PART

On NewWave's
Motion for Partial Summary Judgment
GRANTED IN PART, DENIED IN PART

On NewWave's *Daubert* and D.R.E. 702
Motion to Exclude the Testimony
of Eric Steager
GRANTED IN PART, DENIED IN PART

On Defendants/Counterclaim-Plaintiffs'
Motion to Exclude the Testimony of
Expert Bryan Bergeron, MD
DENIED

On Defendants/Counterclaim-Plaintiffs'
Motion to Strike NewWave's Supplemental
Expert Report of Bryan Bergeron, MD
DENIED

MEMORANDUM OPINION

Chad M. Shandler, Esq., Tyler E. Cragg, Esq., Richards, Layton & Finger, P.A., Wilmington, DE, Brandon H. Elledge, Esq. (*pro hac vice*) (Argued), Robert J. Farlow, Esq. (*pro hac vice*), Holland & Knight LLP, Tysons, VA, John P. Morgan, Esq. (*pro hac vice*), Holland & Knight LLP, Washington, DC, *Attorneys for Plaintiff/Counterclaim-Defendant*

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JOHNSTON, J.

PROCEDURAL CONTEXT

This case is based on disputes arising from a Stock Purchase Agreement ("SPA") and an Earnout Agreement ("EOA"). Acquiror Plaintiff NewWave alleges breach of the SPA (Count I); fraud in the inducement (Count II); and declaratory judgment regarding funds held in escrow (Count III). Defendants' Counterclaims subject to the instant motions include: breach of the SPA (Counterclaim I); Breach of the EOA (Counterclaim II); fraudulent inducement (Counterclaim III); tortious interference with business relations (Counterclaim IV);

defamation (Counterclaim V); and declaratory judgment in connection with funds held in escrow (Counterclaim VI).

The Court heard argument on the 5 pending motions on March 2, 2023. A bench trial is scheduled to begin April 3, 2023. Because of the press of time, this opinion is designed to provide the parties with guidance and decisions sufficiently in advance of trial to permit preparation. A pre-trial opinion setting forth the Court's fulsome reasoning unfortunately is not possible.

SUMMARY JUDGMENT STANDARD

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[1] All facts are viewed in a light most favorable to the non-moving party.[2] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.[3] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[4] If the non-moving party bears the burden of proof at trial, yet "fails to make a

[1] Super. Ct. Civ. R. 56(c).
[2] *Burkhart v. Davies*, 602 A.2d 56, 58–59 (Del. 1991).
[3] Super. Ct. Civ. R. 56(c).
[4] *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[5]

Partial summary judgment is also available pursuant to Superior Court Civil Rule 56. That mechanism may address individual claims.[6] When considering a partial summary judgment motion, the Court must consider the evidence of record in the light most favorable to the non-moving party.[7] Further, the moving party bears the initial burden of proof.[8] However, if the movant meets its initial burden regarding an issue, the burden then shifts to the non-moving party to demonstrate the existence of a material issue of fact regarding that issue.[9] At that point, the non-movant must demonstrate material facts in dispute that are sufficient to withstand a motion for a judgment as a matter of law and support the verdict of a reasonable jury.[10]

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[5] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
[6] *See* Super. Ct. Civ. R. 56(a)–(b) (providing that either the claimant or defending party may move for summary judgment as to all of a case, or any part thereof).
[7] *Brozaka v. Olsen*, 668 A.2d 1355, 1364 (Del. 1995).
[8] Super. Ct. Civ. R. 56(e); *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[9] *Id*. at 681 (citing *Hurtt v. Goleburn*, A.2d 134 (Del. 1974)).
[10] *Lum v. Anderson*, 2004 WL 772074, at *2 (Del. Super.).

ANALYSIS

Count I—Breach of the SPA

Genuine issues of material fact prevent summary judgment on Count I. These broadly include whether iQuartic's EHRProfiler: was "fully functional"—as represented and warranted under the SPA; and worked as designed, described and represented from the day iQuartic was acquired.

Section 2.12(e)(ii) of the SPA warrants that all "Company Systems" are "fully functional and operate and run in a reasonable and efficient business manner . . . ." NewWave's contract claim is based upon defining iQuartic's "EHRProfiler" as a "System." Section 2.12(e) defines "Systems" as "computer hardware, firmware, databases, Software, systems, information technology infrastructure, and other similar or related items of automated, computerized and/or software systems, infrastructure, and telecommunications assets and equipment including, without limitation, websites and any other outsourced systems and processes."

NewWave asserts that the EHRProfiler is a source code. A source code is "Software" in the SPA definition of "intellectual property." Section 2.12(e)(iii) represents:

> [All of the Company's Systems] are sufficient for the current and currently contemplated needs of the business

> of the Company including as to capacity and ability to meet current peak volumes and anticipated volumes in a timely manner, and there have been no material failures, breakdowns, outages, or availability of any of the foregoing Software or Systems . . . ."

Defendants argue that the EHRProfiler is a "Product, and thus not subject to the Section2.12(e)(ii) warranty. Section 2.12(f) of the SPA defines "Company Products." The EHRProfiler is listed as a "Product" on Schedule 2.12(f).

The Court finds that the EHRProfiler falls within the SPA definitions of Software, System, *and* Product. The "Systems" definition is very broad. Under the terms of the SPA, the Section 2.12(e)(ii) warranty applies to the EHRProfiler.

Count II—Fraud/Fraud in the Inducement

Genuine issues of material fact prevent summary judgment on Count II. NewWave has demonstrated factual issues involving alleged misrepresentations by Defendants Jiang, Asarsa, and Dolph. While Defendants dispute that any representations were knowingly false, or made with reckless indifference to the truth, purported falsity and fraudulent intent involve credibility determinations inappropriate for resolution at summary judgment.

Count III and Counterclaim VI
Declaratory Judgment (Funds in Escrow)

Resolution of the propriety of releasing funds held in escrow is dependent on the outcome of Counts I and II. Therefore, genuine issues of material fact prevent a summary judgment determination on either Count III or Counterclaim VI.

Counterclaim I—Breach of the SPA

SPA Section 7.3

NewWave argues that Counterclaim I is time-barred.

Section 7.3 of the SPA provides that Section 4 representations "continue until the fifteen (15) month anniversary of the Closing Date. Each representation and warranty . . . will further survive if the party asserting such Claim will have provided written notice . . . ." The Closing date is May 10, 2019. Fifteen months thereafter is August 9, 2020. The parties dispute whether Defendants gave timely written notice of their Section 4.7 breach of warranty claim. Section 9.4 states that all notices be mailed to NewWave headquarters, with a copy mailed to NewWave's counsel.

The record reflects that certain Defendants sent written notice to New Wave through the Earn-Out Sellers' Objection Letter and its Exhibit, the Document Preservation Demand, and back-and-forth correspondence concerning what has

been called the "Direct Indemnity Claim Notice." The correspondence was mailed to NewWave, with copies to counsel.

The Court finds that these documents provided sufficient written notice as required by Section 9.4, within the 15-month period designated under Section 4.7. Therefore, Counterclaim I is not time-barred.

SPA Section 4.7

Section 4.7 of the SPA required NewWave, at the time of closing, to have "sufficient cash on hand or other sources of immediately available funds to enable it to make payment of the Purchase Price, and to consummate the other transactions contemplated by this Agreement." "Purchase Price" is defined as "the Base Purchase Price . . . plus the Post-Closing NWC Adjustment (which may be zero, or a positive or negative number) . . . plus the Earn-Out Payment(s), if any, as paid in accordance with the Earn-Out Agreement . . . ." The Earn-Out amounts, if any, are calculated as of the end of the 2019 (March 31, 2020) and 2020 (March 31, 2021) Earn-Out Periods.

Defendants argue that Section 4.7 should be interpreted to require that New Wave have on hand $16,321,515 to fund: (1) the Base Purchase Price of $6,084,013; (2) $9,400,000 in Earn Out payments; and (3) just over $800,000 in promissory notes. Further, Defendants contend that NewWave should have had at

the time of closing $76,000 per month, for 24 months (the end of the second Earn-Out period), for operating expenses. This additional $1,824,000 brings to total asserted by Defendants to $18,145,555.

NewWave counters that it paid the agreed Purchase Price at closing. Additionally, there was no requirement to fund the potential for Earn-Out payments at the time of closing because the EOA included an agreed-upon budget. NewWave had in excess of $17.6 million in retained earnings and net income as of January 2020, even if NewWave were determined to have all funds listed by Defendants on hand. NewWave's audited financial statement also reflects an on-demand line of credit enabling it to borrow at least $8,000,000.

Defendants argue that the Court should not look to NewWave's assets. Rather the funds available should be only those on iQuartic's post-closing balance sheet.

The Court finds that Defendants position is neither commercially reasonable nor required by the SPA. Other than the Purchase Price, Section 4.7 did not specifically itemize any amounts. Rather, Section 4.7 requires generally that New Wave have "sufficient cash on hand or other sources of immediately available funds to enable it to make payment of the Purchase Price, and to consummate the other transactions contemplated by this Agreement." Section 4.7 goes on to

discuss NewWave's representations regarding future financial stability by warranting that NewWave is not the subject of threatened insolvency proceedings, or likely to become insolvent. Section 4.7 does not mandate that NewWave continue to have immediately available funds for any specific future period of time or for payment of any contingent obligations.

The parties contemplated that Earn-Out payments would be based on the future performance of iQuartic. Thus, these payments were contingent. The parties could have, but did not, contractually require that potential maximum Earn-Out funds be placed in escrow at the time of closing.

Even if NewWave had been required to have fully-funded Earn-Out amounts on hand, NewWave's balance sheet and audited financial statement reflect compliance with that obligation. Defendants's argument—that the only relevant balance sheet is that of iQuartic—is not persuasive. NewWave is the signatory to the SPA and EOA, and therefore the payor obligated to fund "the other transactions."

Therefore, the Court finds as a matter of law, based on undisputed facts, that NewWave did not breach the representation set forth in SPA Section 4.7. Summary judgment is granted in favor of New Wave on this issue.

Counterclaim III—Fraud/Fraud in the Inducement

Defendants allege iQuartic would not have signed SPA if Defendants had known that NewWave did not obtain sufficient funding to support iQuartic's personnel and technical development needs. Alternatively, NewWave never intended to support the Earn-Out Sellers' ability to achieve the stated metrics under the EOA.

The Court finds that genuine issues of material fact prevent summary judgment on Counterclaim III.

Counterclaim IV—Tortious Interference with Business Relations

Defendants' tortious interference with business relations Counterclaim IV is based on NewWave's alleged interference with iQuartic's pre-acquisition business plan and iQuartic's contract with Cognisight. NewWave has asserted that the third-party "stranger" rule precludes tortious interference claims against owners and agents of companies that contract with a plaintiff.

The Court finds that the stranger rule does not apply. This rule has been rejected by Delaware courts.[11] However, bad faith and/or malicious behavior must be demonstrated.

[11] *Athene Life & Annuity Co. v. Am. Gen. Life Ins. Co.*, 2020 WL 2521557, at *32–33 (Del. Super.) (citing *Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP*, 2019 WL 4927053 (Del. Ch.)).

Defendants have alleged that iQuartic had a previously-established business relations with Cognisight, and entered into a contract with Cognisight post-acquisition. The tortious interference claims include bribery and false accusations by a persons serving as an officer of both NewWave and iQuartic. This conduct constitutes bad faith and malicious behavior, for the purpose of establishing genuine issues of material fact supporting tortious interference with business relations. The other elements necessary for a tortious interference claim—a business opportunity, proximate cause, and damages—also are hotly-disputed facts.

Therefore, summary judgment is denied on Counterclaim IV.

Counterclaim V—Defamation

Genuine issues of material fact prevent summary judgment on this Counterclaim. The statement at issue is the June 29, 2020 statement of iQuartic's former Director of Coding. The statement relates to manual coding and the alleged inability of iQuartic to process medical records provided by Cognisight. Contested facts include: the accuracy of statement; whether there was publication to a third party; whether any publication was privileged; and reputational damage.

The Court finds that summary judgment must be denied on Counterclaim V.

Counterclaim II—Breach of EOA

Section 2.2(c) of the Earn-Out Agreement provides:

> Enterprise Account Targets. If the number of Lives served under Enterprise Accounts for the 2019 Earn-Out Period is equal to or greater than the Minimum Enterprise Account Target as set forth in Schedule 2.2, or not equal to or greater than the Maximum Enterprise Account Target as set forth in Schedule 2.2, then the Buyer will pay to the Earn-Out Sellers an Earn-Out Payment equal to the Minimum Earn-Out Payment. If the number of Lives served . . . is less than the Minimum Enterprise Account Target, then no Earn-Out Payment shall be due . . . . If the number of Lives served . . . is equal to or greater than the Maximum Enterprise Account Target . . . then the Buyer will pay . . . the Maximum Earn-Out Payment.

The EOA defines "Life" as "one patient or one unique medical record file." The term "served" is not defined.

Schedule 2.2 states that the Minimum Enterprise Account Target was "Enterprise Accounts serving at least 35,000 Lives in the aggregate," resulting in an Earn-Out Payment of $1,600,000. The Maximum Enterprise Account Target was "Enterprise Accounts serving at least 67,000 Lives in the aggregate," resulting in an Earn-Out Payment of $3,100,000.

The EOA defines "Enterprise Account" as:

> [A] customer account with a health care provider, payer, or service/vendor system, which is documented by a written contract, executed by the customer, and that (i) satisfies the Period of Performance Requirement, and (ii)

> has a price per Life served payment model. For purposes of the foregoing sentence, a contract satisfies the "Period of Performance Requirement" if (A) such contract has a defined term of at least six (6) months, (B) six (6) months or more after the execution of such contract, the contract has not been terminated and at least two (2) executed Statements of Work have been executed under such contract that have not been terminated, or (C) for a pilot contract, such contract is fully performed and the customer executes a Letter of Intent to enter into a paid customer contract within six (6) months following completion of the pilot contract.

In accordance with the Court's May 17, 2022 ruling, the parties appeared before a Neutral Accountant. The Neutral Accountant issued a "binding and conclusive" determination that the 2019 Enterprise Account Target depends upon the definition of "Lives served." Because the Court had not performed a legal analysis of that definition, the Neutral Accountant provided alternative conclusions as to the value of the Earn-Out Payments.

The Neutral Accountant concluded that to achieve the Minimum Earn-Out Payment for 2019, 35,000 Lives served were required. The Maximum Earn-Out Payment required 67,000 Lives served. During the first Earn-Out period, 808 medical records were actually processed by iQuartic. The Cognisight contract was for the processing of 70,000 medical charts. If "Lives served" ultimately was determined to mean only the number of records actually processed or served (NewWave's position), no Earn-Out Payment would be due. If "Lives served"

means medical records covered by Enterprise Accounts, whether or not actually processed (Defendants' position), the Earn-Out Payment would be $3.1 million.

The Cognisight contract forms the basis for the 2019 Earn-Out Payment calculation. The Cognisight Scope of Work states: "Cognisight will pay a monthly fee equivalent to the annualized value for processing 70,000 medical charts at a base price of $4.35 a chart, or $25,375." iQuartic billed Cognisight for three months. Cognisight terminated the contract and demanded a full refund of the $39,000 Cognisight had paid iQuartic. This termination was in accordance with the contract's provision for termination by either party without cause, but with 30-days written notice.

The definition of "Enterprise Account" requires that the customer account must satisfy the "Period of Performance Requirement." The Period of Performance Requirement is not met if the Enterprise Account is terminated under specified circumstances.

Section 2.2(c) of the EOA refers to "Lives served" in the past tense. NewWave argues that this must mean that in order to be included in the Earn-Out calculation, the record or chart must have been actually coded or processed. Otherwise, the EOA language should have been "Lives *to be* served."

The parties incorporated the phrase "the number of Lives to be served, as stated in the customer contract" in the EOA definition of "New Contracted Revenue." "New Contracted Revenue Targets" is a term used for calculation of any 2020 Earn-Out Payment.

Several factors compel a finding that "Lives served" does not mean "Lives *to be* served." First, the parties used the "to be" language in the EOA "New Contracted Revenue" definition, but not in Section 2.2(c). Second, the Cognisight contract did not guarantee either the processing of or payment for 70,000 records. In fact, the contract contemplated the possibility of early termination, without cause. The contract was terminated and a full refund sought. Therefore, iQuartic was not paid to process 70,000 records. From Cognisight's perspective, iQuartic was not entitled to any revenue for Lives served.

Third, Defendants argue that "as the 2019 Earn-Out goals were not revenue-based, iQuartic was only required to contract the desired Enterprise Accounts to receive the 2019 Earn-Out Payment." It simply does not make reasonable business sense that the parties agreed that Defendants would be entitled to an Earn-Out Payment based on revenue never earned by iQuartic. Such an agreement would mandate a transfer of potentially non-existent funds. Obtaining an Enterprise Account with the possibility of "serving at least 35,000 Lives in the

aggregate" was the first part of meeting the Minimum Enterprise Account Target. Section 2.2(c) includes the further requirement of actually serving the target number of Lives. Section 2.2(c) states: "If the number of Lives ***served under*** the Enterprise Accounts," as opposed to "If the Enterprise Account covers the number of Lives served" (or similar language).

In accordance with the foregoing legal interpretation of "Lives served," and pursuant to Neutral Accountant's opinion, the 2019 Earn-Out Payment calculation is based on 808 records actually processed. Therefore, the Court finds that no 2019 Earn-Out Payment is due.

On NewWave's Daubert and D.R.E. 702
Motion to Exclude the Testimony
of Eric Steager

Expert Eric Steager opines on the definition of "Lives served." This is a term contained in the EOA.

The Court finds that the meaning and implication of "Lives served" is a purely legal determination. As previously set forth, the Court has decided the legal definition of "Lives served." Therefore, Expert Steager's opinion on this issue is moot. Further, the opinion on "Lives served" is excluded as not

admissible to provide assistance either to the trier of fact or to the Court in making legal decisions of contract interpretation.[12]

The second part of Steager's opinion is offered to rebut the valuation methodologies employed by NewWave's damages expert. The Court will consider this testimony, and give it the appropriate weight in the exercise of judicial discretion.

On Defendants/Counterclaim-Plaintiffs' Motion to Exclude the Testimony of Expert Bryan Bergeron, MD and On Defendants/Counterclaim-Plaintiffs' Motion to Strike NewWave's Supplemental Expert Report of Bryan Bergeron, MD

The Delaware Supreme Court has adopted the Daubert standard to determine the admissibility of expert testimony.[13] Under this standard, the Court asks whether: (i) the witness is "qualified as an expert by knowledge, skill, experience, training or education;" (ii) the evidence is relevant and reliable; (iii) the expert's opinion is based upon information "reasonably relied upon by experts in the particular field;" (iv) the expert testimony will "assist the trier of fact to understand

[12] D.R.E. 702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Eskin v. Carden*, 842 A.2d 1222, 1227 (Del. Super. 2004).
[13] *See Eskin v. Carden*, 842 A.2d 1222, 1231 (Del. 2004) (citing *Daubert v. Merrell Dow*, 509 U.S. 579 (1993)).

the evidence or to determine a fact in issue;" and (v) the expert testimony will not create unfair prejudice or confuse or mislead the jury.[14]

When assessing the second factor of the Daubert standard—the reliability of the expert's opinion—trial courts consult a non-exclusive list of four more questions: (1) whether the opinion at issue is susceptible to testing and has been subjected to such testing; (2) whether the opinion has been subjected to peer review; (3) whether there is a known or potential rate of error associated with the methodology used and whether there are standards controlling the technique's operation; and (4) whether the theory has been accepted in the scientific community.[15]

Delaware Rule of Evidence 702 provides that an expert witness may provide opinion testimony if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

[14] *Id*. at 1227 (quoting *Cunningham v. McDonald*, 689 A.2d 1190, 1193 (Del. 1997)).
[15] *Sturgis v. Bayside Health Ass'n Chartered*, 942 A.2d 579, 584 (Del. 2007).

Defendants object to Dr. Bryan Bergeron's ("Dr. Bergeron") testimony and report because they are based on an inaccurate factual predicate. Defendants claim Dr. Bergeron has never reviewed the correct source code for the EHRProfiler. Rather, Dr. Bergeron allegedly reviewed the source code only designed for visual demonstration of the user interface component of the EHRProfiler.

The Court finds Defendants' objections go to the weight to be given to the testimony. Dr. Bergeron's report and testimony will not be stricken or excluded. Defendants' Motion to Exclude the Testimony of Expert Bryan Bergeron, MD, and Motion to Strike NewWave's Supplemental Expert Report of Bryan Bergeron, MD, are both denied.

CONCLUSION

The Court finds that genuine issues of material fact prevent summary judgment on: Count I—Breach of the SPA; Count II—Fraud/Fraud in the Inducement; Count III and Counterclaim VI Declaratory Judgment (Funds in Escrow); Counterclaim III—Fraud/Fraud in the Inducement; Counterclaim IV—Tortious Interference with Business Relations; and Counterclaim V—Defamation.

Counterclaim I—Breach of the SPA—is not time-barred. However, the Court finds as a matter of law, based on undisputed facts, that NewWave did not

breach the representation set forth in SPA Section 4.7. Summary judgment is hereby **GRANTED** in favor of NewWave on this issue**.**

On Counterclaim II— Breach of EOA—the Court finds that "Lives served" under the EOA means medical records actually processed. Pursuant to the Neutral Accountant's alternative opinion, the 2019 Earn-Out Payment calculation is based on 808 records actually processed. Therefore, the Court finds that no 2019 Earn-Out Payment is due. Summary Judgment is hereby **GRANTED** against Defendants on this issue.

The Court has determined the legal definition of "Lives served." Therefore, Expert Steager's opinion on this issue is moot. The second part of Steager's opinion is offered to rebut the valuation methodologies employed by NewWave's damages expert. The Court will consider this testimony, and give it the appropriate weight in the exercise of judicial discretion. Therefore, NewWave's *Daubert* and D.R.E. 702 Motion to Exclude the Testimony of Eric Steager is hereby **GRANTED IN PART AND DENIED IN PART**.

Defendants/Counterclaim-Plaintiffs' Motion to Exclude the Testimony of Expert Bryan Bergeron, MD, and Defendants/Counterclaim-Plaintiffs'

Motion to Strike NewWave's Supplemental Expert Report of Bryan Bergeron, MD, are hereby **DENIED**. The objections set forth in the motions go to the weight to be given to the testimony.

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston